STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hon. Hilda R. Gage, Presiding Judge

SHIRLEY RORY and ETHEL WOODS,

Plaintiff-Appellee,

v. **Supreme Court No. 126747**

CONTINENTAL INSURANCE COMPANY,
a CNA COMPANY,

Defendant-Appellant.

Court of Appeals No. 242847
Wayne County Circuit Court No. 00-027278-CK

BRIEF OF DEFENDANT-APPELLANT CONTINENTAL INSURANCE COMPANY

PROOF OF SERVICE

* * * ORAL ARGUMENT REQUESTED * * *

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STATEMENT OF JURISDICTION

Defendant/Appellant, Continental Insurance Company, a CNA company files this application for leave to appeal from the Court of Appeals' opinion of July 6, 2004 (63a). By order of October 28, 2004, the Court granted the application, thus vesting jurisdiction in the Court based on MCR 7.302(F)(3).

QUESTION PRESENTED FOR REVIEW

APPELLANT, CONTINENTAL INSURANCE COMPANY, CONTRACTED WITH THE PLAINTIFFS FOR CERTAIN INSURANCE COVERAGES. THE UNAMBIGUOUS CONTRACTUAL LANGUAGE OF THE POLICY REQUIRES THAT THE INSUREDS CLAIMING UNINSURED MOTORIST BENEFITS MUST DO SO WITHIN ONE YEAR FROM THE DATE OF THE ACCIDENT OR BRING SUIT WITHIN ONE YEAR FROM THE DATE OF THE ACCIDENT FOR THESE BENEFITS. IT IS UNDISPUTED THAT THE PLAINTIFFS DID NOT MAKE A CLAIM FOR UNINSURED MOTORIST BENEFITS WITHIN THE ONE YEAR CONDITION CONTAINED IN THE CONTRACT. NOR DID PLAINTIFFS FILE SUIT WITHIN ONE YEAR UNDER AN ALTERNATIVE REQUIREMENT OF THE CONTRACT'S CONDITIONS. DID THE TRIAL COURT COMMIT ERROR REQUIRING REVERSAL BY DENYING CONTINENTAL'S MOTION FOR SUMMARY DISPOSITION BASED ON THE PLAINTIFFS' FAILURE TO MAKE A TIMELY CLAIM FOR UNINSURED MOTORIST BENEFITS?

The Trial Court said:	"No."
The Court of Appeals said:	"No."
Plaintiffs/Appellees answer:	"No."
Defendant/Appellant answers:	"Yes."

STATEMENT OF FACTS AND PROCEEDINGS

A. Overview

This case involves plaintiff's untimely claim for uninsured motorist benefits under the insurance policy issued by Appellant Continental to plaintiffs. The date of the accident was May 15, 1998, and it is undisputed that on March 14, 2000, plaintiffs made their claim for uninsured motorist benefits. It is further undisputed the policy unambiguously requires that a claim or suit for uninsured motorist benefits must be made within one year of the date of the accident.

On two occasions, the trial court denied summary disposition to defendant. Following the second denial, Continental filed an application for leave to appeal to the Michigan Court of Appeals, which was granted. The application was prompted by the unpublished decision from the Michigan Court of Appeals entitled *Carvan Williams v Continental Insurance Company,* which involved the identical issue and policy language. The Court of Appeals found that the one-year limitation was a reasonable time period to file a claim or bring a lawsuit for uninsured motorist benefits and was "not so unreasonable as to be unenforceable." (50a-51a, *Carvan Williams v Continental Ins. Co.,* Court of Appeals No. 229183, released April 23, 2003.)

Following oral argument, the Court of Appeals released its published decision affirming the trial court's denial of summary disposition on the basis that the one-year limitation was an unreasonable time restriction to make a claim or bring a lawsuit for uninsured motorist benefits. (63a-67a, Court of Appeals Opinion.) Apparently, the Court

of Appeals concluded that because the Legislature provided a three-year limitations period for personal injury claims arising from motor vehicle accidents, "whether or not the insured has sufficient information to know if a serious impairment has been sustained," the contractual uninsured motorist claim period of one year was unreasonable. (63a-67a, Court of Appeals Opinion, pp. 4-5.) Seemingly, the Court of Appeals decision requires that the claim period for bringing a contractual claim for uninsured motorist benefits must be a minimum of three years. The Court of Appeals in this case also rejected the application of the prior published decision from the Court of Appeals of *Hellebuyck v Farm Bureau Gen. Ins.*, 262 Mich App 250; 685 NW2d 684 (2004). The *Hellebuyck* policy required that a lawsuit for uninsured motorist benefits be filed within one year from the date of the accident. The Court of Appeals distinguished this case from *Hellebuyck* by concluding that: "We note at the outset that the issue is solely one of reasonableness. Questions of ambiguity and public policy are not at issue." (63a-67a, Court of Appeals Opinion, p. 2.)[1]

Accordingly, there are two precedential Court of Appeals decisions with contradictory

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[1]The Court of Appeals distinguished *Hellebuyck* and this Court's decision of *Morley v Auto Club of MI,* 458 Mich 459; 581 NW2d 237 (1998) by stating that:

> "Neither *Morley* nor *Hellebuyck* addressed the issue of the reasonableness of the contractual limitation. *Morley* only involved the issue of whether the policy was ambiguous. The contractual provision in *Morley* provided for a three-year limitation period, and its reasonableness was not addressed. *Hellebuyck* also addressed on the issue of ambiguity. The reasonableness of the one-year limitation was not considered."

(63a-67a, Court of Appeals decision.)

results – one holding that the one-year claim limitation period is enforceable and the other holding that it is not within the context of uninsured motorist benefits.

B. Factual Background

The Plaintiffs were injured in an automobile accident with an individual named Charlene Haynes on May 15, 1998. (45a-48a, Opinion and Order Denying Defendant's First Motion for Summary Disposition dated June 6, 2001.) Plaintiffs then filed suit against Continental Insurance for first-party no fault benefits as well as filing suit against Charlene Hayes based on third-party residual liability. (45a-48a, June 6, 2001, Opinion and Order.) During the suit against Charlene Haynes, "it was determined" that she was uninsured. (45a-48a, June 6, 2001, Opinion and Order.)[2]

On March 14, 2000, the plaintiffs claimed uninsured motorist benefits from the Defendant reflected in a correspondence dated March 14, 2000. (45a-48a, Opinion and Order; 13a, March 14, 2000, correspondence.)

Plaintiffs then filed this action on August 18, 2000, claiming entitlement to uninsured motorist benefits. (14a-16a, Complaint.)

As a condition precedent for uninsured motorist benefits, Continental's policy requires that a claimant file a claim or suit for such benefits within one year from the date of the accident. (6a-10a, insurance policy, p. 2 of 5.)

Accordingly, on or about December 18, 2000, Continental filed a motion for summary

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[2]The police report completed at the time of he accident, however, showed that Ms. Haynes had no insurance. (11a, Police Report.)

disposition maintaining it was undisputed that plaintiffs failed to file a timely claim with Continental, (or file suit), within one year from the date of the action and hence failing to comply with the condition precedent for uninsured motorist benefits. In response, plaintiffs maintained that the one-year provision was unreasonable as a matter of law. Primarily, plaintiffs claimed they were unaware of Ms. Haynes' uninsured status until after one year following the accident, and therefore, they should not be penalized for not discovering that fact sooner although the police report showed that Hayes had no insurance. (11a, Police Report; and 23a-29a, Plaintiff's Answer to Motion.)

The trial court heard oral arguments on the summary disposition motion. (31a-44a, Transcript of Hearing of February 16, 2001.) On June 6, 2001, the trial court issued its Opinion and Order noting that "[O]n its face, the Defendants' argument seems correct," but the court nevertheless held: (1) The shortened "period of limitations "in this case acted as a "practical abrogation of the right of action," and (2) the limitation period "also bars the action before the loss or damage can be ascertained." In conclusion, the court found that the shorter "period of limitation" was "unreasonable."[3] (45a-48a, Opinion.)

Continental then filed a delayed application for leave to appeal with the Court of

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[3]The trial court misread the condition as a strict statute of limitations provision requiring the plaintiffs to bring "an action." Under the plain language of the policy, however, all the plaintiffs had to do was file a notice of claim with Continental to preserve their rights to uninsured motorist benefits. It is undisputed that plaintiffs had previously timely filed against Continental for personal protection insurance benefits, which under the pertinent statute, has a limitations period of one year: "An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than one year after the date of the accident of causing the injury. . . ." See, MCL 500.3145(1).

Appeals seeking interlocutory relief. The docket number was 235620. In an October 26, 2001, order, the Court of Appeals denied the delayed application for leave to appeal for failure to persuade the Court of the need for immediate appellate review. (49a, COA Order.)

After the denial of Appellant's first application for leave to appeal, the Court of Appeals released an unpublished decision involving identical policy language and a similar factual situation. The Court of Appeals affirmed the order of summary disposition in that case which found the claim filing period reasonable. (50a-51a, *Carvan Williams v Continental Ins. Co.*, unpublished Court of Appeals decision released April 23, 2002; Docket No. 229183.) Accordingly, defendant filed a second motion for summary disposition based on the *Williams* decision. The motion was heard on June 21, 2002, in the Wayne County Circuit Court before the Honorable Robert L. Ziolkowski. (54a-60a, Transcript of June 21, 2002, hearing.) Judge Ziolkowski denied the motion stating that the one-year provision was a "significant reduction in the time limit [and] unreasonable." (54a-61a, June 21 transcript at p. 6.

The order denying Defendant's second motion for summary disposition was entered on July 22, 2002. (61a, Order.)

Continental then filed its second application for leave to appeal with the Court of Appeals in light of the *Williams* determination. The Court granted the application in an order entered October 11, 2002. (62a, COA Order.)

The Court of Appeals issued its published per curium decision in this case on July 6, 2004, affirming the denial of summary disposition finding that the one-year claim period for

uninsured motorist benefits was not a reasonable period of time. (63a-67a, COA Opinion.) The Court distinguished this case from the recently published decision of *Hellebuyck v Farm Bureau Gen. Ins.*, 262 Mich App 250, 685 NW2d 684 (2004), held in abeyance 688 NW2d 91 (2004), on the basis that *Hellebuyck* involved the question of whether the language was ambiguous as opposed to the issue of whether the contractual limitation was reasonable.

Defendant Continental sought this Court's review of the Court of Appeals' decision by filing a timely application for leave to appeal on August 6, 2004. By order of October 28, 2004, the application was granted.

The Court is now urged to reverse the decisions of both the Court of Appeals and the trial court and direct that an order of summary disposition be entered in the Circuit Court finding that plaintiffs' claim for uninsured motorist benefits under the plain language of the uninsured motorist agreement was untimely and, therefore, plaintiffs' claim for those benefits is barred.[4]

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[4]Since the granting of Continental's application, this Court granted a motion by Farm Bureau General Insurance Company of Michigan for leave to file an amicus curiae brief in support of Continental's appeal.

Farm Bureau's amicus curiae brief was filed on November 4, 2004. Continental concurs with the arguments in that brief and adopts them in their entirety in Continental's appeal.

INTRODUCTION

At its heart, this case involves plaintiffs' claim that Continental breached its uninsured motorist contract with the plaintiffs to pay them uninsured motorist benefits even though the plaintiffs admit that they did not timely file their claim per the plain language of the contract. Plaintiffs' argument, which was adopted by both the circuit court and Court of Appeals, is essentially that if a party to a contract finds any part of the contractual language "unreasonable," that language should be stricken but the balance of the contract enforced. It must be kept in mind that the contractual language at issue in this case is not a subject of statutory requirement but rather is an agreement between the parties without any reference to statutory mandates. Obviously, if the Court of Appeals and the circuit court's determinations are viewed as correct statements of the law of this state, than any contractual agreement between parties would be subject to post-contracting reinterpretation and rewriting. This is not a case where the contractual language is in violation of the state constitution, statutes, or even preexisting common law. In fact, the language is consistent with this state's constitution and common law in regard to enforcement of contractual provisions and particularly conditions precedent and time requirements. In fact, as addressed in the Farm Bureau amicus pleading, this Court has rejected "reasonableness" as a basis for interpreting contracts in the recent decision of *Wilkie v Auto Owners Ins. Co.*, 469 Mich 41, 62; 664 NW2d 776 (2003). Accordingly, this Court should reverse the decision of both the Court of Appeals and the trial court and direct that an order of summary disposition be entered in favor of Continental.

A. Standard of Review.

The grant or denial of a motion for summary disposition is reviewed by this court under a de novo standard. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Defendant's motion for summary disposition was premised upon MCR 2.116(C)(7): "The claim is barred because of the statute of limitations," MCR 2.116(C)(8): "The opposing party has failed to state a claim upon which relief can be granted." Also upon further reflection because documentation outside the pleadings was referenced in the motion and in response to the motion, it should have also been postured on MCR 2.116(C)(10) no genuine issue as to any material fact. Nonetheless, failure to cite the proper sub-rules does not preclude review of summary disposition under the proper sub-rule. *Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55; 490 NW2d 5 (1993); lv den 443 Mich 875 (1993); and *Jones v Employers Ins. of Wausau*, 157 Mich App 345; 403 NW2d 130 (1987).

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. *Maiden, supra*, at p. 119. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive materials, and the opposing party need not reply with supportive materials. Id. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." Id. at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co.*, 451 Mich 358; 547 NW2d 314 (1996).

A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. *Maiden*, at p. 120.

The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere

possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. *Maiden*, at p.121.

ARGUMENT

APPELLANT, CONTINENTAL INSURANCE COMPANY, CONTRACTED WITH THE PLAINTIFFS FOR CERTAIN INSURANCE COVERAGES. THE UNAMBIGUOUS CONTRACTUAL LANGUAGE OF THE POLICY REQUIRES THAT THE INSUREDS CLAIMING UNINSURED MOTORISTS BENEFITS MUST DO SO WITHIN ONE YEAR FROM THE DATE OF THE ACCIDENT OR BRING SUIT WITHIN ONE YEAR FROM THE DATE OF THE ACCIDENT FOR THESE BENEFITS. IT IS UNDISPUTED THAT THE PLAINTIFFS DID NOT MAKE A CLAIM FOR UNINSURED MOTORIST BENEFITS WITHIN THE ONE YEAR CONDITION CONTAINED IN THE CONTRACT. NOR DID PLAINTIFFS FILE SUIT WITHIN ONE YEAR UNDER AN ALTERNATIVE REQUIREMENT OF THE CONTRACT'S CONDITIONS. THE TRIAL COURT COMMITTED ERROR REQUIRING REVERSAL BY DENYING CONTINENTAL'S MOTION FOR SUMMARY DISPOSITION BASED ON THE PLAINTIFF'S FAILURE TO MAKE A TIMELY CLAIM FOR UNINSURED MOTORIST BENEFITS.

1. Rules of contract instruction

As an insurance policy is a contract, courts examine the instrument itself to determine its meaning and it is enforced as written if it fairly allows of but one interpretation. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70-71; 467 NW2d 17 (1991); *Auto Club Insurance Association v DeLaGarza*, 433 Mich 208, 213; 444 NW2d 803 (1989). The insurance policy must be given its ordinary meaning; technical and strained construction should be avoided. *Fitch v State Farm Fire & Casualty, Company*, 211 Mich App 468; 537 NW2d 273 (1995).

Furthermore, the courts will not make a new contract for the parties under the guise of construing a contract when doing so results in ignoring the plain meaning of the words. *Lintern v Michigan Mutual Liability Company*, 328 Mich 1; 43 NW2d 42 (1950); *Frankenmuth Mutual Insurance Company v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). Correspondingly, where the language of an insurance policy is clear and unambiguous, it must be enforced as written and the courts must be careful not to read an ambiguity into a policy where none exists. *Century Surety Company v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998).

While the rule is that an insurance contract is construed in favor of the insured if an ambiguity is found, this does not mean that a plain meaning or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well-recognized, should be given some alien construction merely for the purpose of benefitting an insured. *Henderson v State Farm File and Casualty Company*, 460 Mich 348; 596 NW2d 190 (1999).

Uninsured and underinsured motorist coverage is not required in Michigan. *Bradley v Midcentury Insurance Company*, 409 Mich 1; 294 NW2d 141 (1980); *Bianchi v Auto Club of Michigan* 437 Mich 65, 68; 467 NW2d 17 (1991). Therefore, the provisions of the No Fault Act, MCL 500.3101 et seq; MCA 24.13101 et seq. are not involved in this case. Thus, the contract of insurance determines under what circumstances the benefits will be awarded. *Wills v State Farm Insurance Company*, 222 Mich App 110, 114; 564 NW2d 488 (1997) and *Rohlman v Hawkeye-Security Insurance Company*, 442 Mich 520, 525; 502 NW2d 310 (1993); reh den 443 Mich 1206 (1993).

2. Application

Applying these rules of construction, the policy plainly provides that an insured preserves his right to seek uninsured motorist benefits by either filing a lawsuit against Continental within one year or **making a claim** for such benefits within one year of the date of the accident.

For the court's benefit, the policy language under consideration is set forth:

> UNINSURED MOTORISTS COVERAGE-MICHIGAN
>
> "In consideration of an additional premium, if the Coverage Summary shows an amount of "Uninsured Motorists" coverage, we will provide the coverage described by the provisions of this endorsement."
>
> INSURING AGREEMENT
> "We will pay compensatory damages which any covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:
>
> 1. Sustained by any covered person, and
>
> 2. Caused by an accident arising out of the ownership, maintenance or use of an uninsured motor vehicle;
>
> Claim or suit must be brought within 1 year from the date of the accident."

(7a, Insurance Policy p. 2.)

Bringing a lawsuit is one option the insured could elect to preserve a claim for uninsured motorists benefits. The other option available to an insured is simply to make a claim for uninsured motorist benefits to Continental.

3. Case Analysis

Although the precise language in the Continental policy had not been reviewed in any prior published Michigan appellate case, other cases have enforced time **limitations for bringing a lawsuit** that shortened the otherwise applicable limitations period in a variety of contractual contexts.[5]

It is well established that an insurer may contractually shorten the statutory six year limitation period for bringing a breach of contract claim for recovery of uninsured/underinsured motorists benefits. *The Tom Thomas Organization, Inc v Reliance Ins Co*, 396 Mich 588, 592; 242 NW2d 396 (1976).

In *Morley v Automobile Club of Michigan*, 458 Mich 459; 581 NW2d 237 (1998); reh den 459 Mich 1204 (1998), the insureds sued their automobile insurer more than three years after they were injured in an automobile accident, alleging refusal to pay an uninsured motorist claim. The specific contract term at issue in that case required the insureds to make a demand for arbitration or suit for uninsured benefits within three years of the accident. *Morley, supra*, at pp 462, 466.

As in this matter, plaintiff filed suit against the defendant claiming that defendant had unreasonably refused to fully pay first party no-fault personal insurance protection (PIP) benefits due under the policy. The Supreme Court noted, "No mention of the uninsured motorist benefits at issue here was made in plaintiff's initial complaint." *Morley*, 458 Mich

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[5]MCL 600.5807(8) provides the general contract 6-year limitations period.

at 463.

Approximately three years and nine months after the accident, plaintiff made a claim for uninsured motorist benefits under the policy.

The trial court ruled in favor of the insureds, the Court of Appeals reversed and the Supreme Court affirmed the Court of Appeals. The Supreme Court rejected the plaintiffs' contention that the contract language was ambiguous, observing:

> In this case, we find that the contract at issue is not ambiguous as claimed by plaintiffs because it fairly allows but one interpretation, that being, as stated by the Court of Appeals: "[T]he policy is unambiguous in its requirement that a person claiming uninsured motorist benefits must do so within three years of the date of the accident."

Morley, 458 Mich at 465.

This Court also rejected the plaintiffs' argument that their compliance with the no-fault provisions of their contract to give immediate notice of the accident qualified as a claim for uninsured motorist benefits:

> To merely consider the facts of this case, and, in fact, any imaginable case, makes the flaws of their argument quite apparent. The report of the accident that the no-fault claim procedure requires could not inform the insurer of the most obviously necessary fact to trigger uninsured motorist coverage, namely, that in the insured's view the tortfeasor was uninsured. Thus, as in our case, where all the defendant knew was that it was not [the at-fault driver's] insurer, this mere report of an accident would not give it the basis to conclude that the tortfeasor, in violation of the statute that requires automobile insurance be carried [statutory citations omitted], did not have automobile no-fault insurance.

Morley, 458 Mich at 467-468.

In *The Tom Thomas Organization case, supra*, this Court stated that the 12-month limitation on suits contained in an Inland Marine Insurance Policy represents a reasonable balance between the insurers' interest in prompt commencement of an action and the insureds' need for adequate time to bring an action:

> The insurance policy provides that no action "shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the insured of the occurrence which gives rise to the claim * * *".
>
> The general rule, absent statute, is that a provision in a policy of insurance limiting the time for bringing suit is valid if reasonable even though the period is less than that prescribed by otherwise applicable statutes of limitation.

See *The Tom Thomas*, 396 Mich at 591-592.

Here, the one year limitation was not as restrictive as that endorsed by *Tom Thomas* as being reasonable. That is, Plaintiffs were not required to bring suit within one year, although they could have elected to do so under the policy; plaintiff merely had to make a claim for uninsured benefits within one year, which did not occur.

The *Tom Thomas* case also acknowledged that this Court has enforced policy limitations of less than six years, the general statute of limitations on contract obligations. See *Tom Thomas*, 396 Mich at 397, at fn 4.

In this regard, see *Bashans v Metro Mutual Insurance Company*, 369 Mich 141; 119 NW2d 622 (1963), enforcing a two (2) year limitation to bring suit in an accidental injury and illness policy; *Betteys v Aetna Life Insurance Company*, 222 Mich 626; 193 NW 197

(1923), (the Michigan Supreme Court holding that a (1) one year limitation to bring suit after proof of loss is provided to the company in a disability or death indemnity policy was enforceable); *Dahrooge v Rochester German Insurance Company*, 177 Mich 442; 143 NW2d 608 (1913), (the Michigan Supreme Court held that a standard fire insurance policy requiring that suit be brought within (1) one year from the time of the fire was enforceable); *Lombardi v Metropolitan Life Insurance Company*, 271 Mich 265; 260 NW 160 (1935), (where the Supreme Court upheld a (2) two year limitation to bring suit from the expiration of the time of within which to file proof of disability in a group disability plan); *Harris v Phoenix Accident & Sick Benefit Association*, 149 Mich 285; 112 NW 935 (1907); (where the Michigan Supreme Court enforced an accident and sick benefit policy's requirement that proofs of loss must be filed within (30) thirty days from the date of the determination of the disability and that no action could be maintained after six months from date on which the proof of loss was required to be filed); and *Dolsen v Phoenix Preferred Accident Insurance Company*, 151 Mich 228; 115 NW 50 (1908), where the policy of insurance required that the action be brought within three (3) months after the time when such a right accrued or after denial of liability, it was held to be enforceable but waived under the circumstances where "the matter was placed by the insurance company in the hands of its counsel who wrote Plaintiff's counsel stating that he would not be able to take the matter up at once and

sent no further communications."[6]

Plaintiff maintains that the notice provision was a statute of limitations to bring an action. The provision in Continental's policy is not a strict statute of limitations; rather Plaintiff could elect to either make a claim or file suit.[7]

In sum, there is nothing contrary or unreasonable about the notice condition in the Continental policy. In fact, it is "more reasonable" than other similar notice conditions that require suit to be filed. Accordingly, the trial court (with the Court of Appeals affirming) committed error requiring reversal in denying Continental's motion for summary disposition because of plaintiffs' untimely claiming of uninsured motorist benefits.

In any event, this Court has explicitly rejected "reasonableness" as articulated by the Court of Appeals, as a basis for interpreting contracts in the decision of *Wilkie v Auto Owners Ins. Co.*, 469 Mich 41, 62; 664 NW2d 776 (2003). Indeed, as this Court ruled in *Wilkie, supra,* the appropriate question is not what the parties might reasonably have expected, but what their contract provides. To this end, it is unnecessary to resort to the

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[6]The cases in this paragraph finding that the shorter limitations periods were enforceable, all acknowledged, however, that the shorter period could be waived by the actions of the insurer. Plaintiff in this case has not alleged nor argued that Continental waived the (1) one year provision in its policy.

[7] An insurance policy's use of the term "suit" has a distinctive meaning from the word "claim" and involves legal proceedings. *Upjohn Company v Aetna Casualty & Surety Co*, 768 F Supp 1186 (1990) and *Michigan Mutual Ins Co v Bronson Plating*, 445 Mich 558; 519 NW2d 864 (1994), reh den 447 Mich 1202; 530 NW2d 745 (1994). On the other hand, the word "claim" means a demand on another for something due or asserted to be due. *Pinckney Comm Schools v Continental Casualty Co*, 213 Mich App 521, 529; 554 NW2d 10; lv den 453 Mich 882 (1996). Also see *Central Wholesale Co v Chesapeake and Ohio Railroad Co*, 366 Mich 138, 149; 114 NW2d 221 (1962), ("A demand of right or alleged right, a calling on another for something due or asserted to be due"); and *Dawlen Corp v New York Central Railroad Co*, 328 Mich 360, 362; 43 NW2d 887 (1950).

traditional rules about insurance policies being strictly construed in favor of the insured because a sufficient basis for resolving the questions is provided by the decision in *Wilkie* and the policy itself. *Wilkie* held that an insured's "reasonable expectations" had no application when interpreting an unambiguous contract because a policy holder cannot be said to have reasonably expected something different from the clear language of the contract. *Wilkie, supra,* 469 Mich at 62. Furthermore, *Wilkie* observed in pertinent part:

> "This approach, where judges . . . rewrite the contract. . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce he agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law in *Terrien v Zwit,* 467 Mich 56, 71; 648 NW2d 602 (2002). The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, § 10, cl 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, Corbin on Contracts, as follows:
>
> > "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made." (15 Corbin, Contracts (interim ed), ch 79 § 1376, p. 27.)

Wilke, 469 Mich at 62.

In addition, the *Wilke* court emphasized the following rationale from this Court's earlier decision of *Raska v Farm Bureau Mut. Ins. Co.,* 412 Mich 355, 362-363; 314 NW2d 440 (1982):

> The expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable. If a person signs a contract without reading all of it or without understanding it, under some circumstances that person can avoid its obligations on the theory that there was no contract at all for there was no meeting of the minds.
>
> But to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just.

Furthermore, the Court of Appeals analysis would effectively obliterate contractual obligations. If it is proper under the Court of Appeals rationale that the party may look at the reasonableness of a contract clause, this should apply to both parties. Accordingly, Continental could then maintain that its applicable coverage amounts are unreasonable and only provide a portion of those amounts in a given case. Obviously, this would completely nullify the principal freedom of contract if the Court of Appeals decision is held as precedential authority.

RELIEF REQUESTED

WHEREFORE, Defendant/Appellant Continental Insurance Company, a CNA company, respectfully requests that this Honorable Court reverse the Court of Appeals and trial court decisions and direct that an order of summary disposition be entered in favor of Continental that it is not obligated to provide uninsured motorist benefits to the plaintiffs because of their untimely claim for those benefits, together with any and such relief as this Court deems necessary and just.

Dated: December 10, 2004

GARAN LUCOW MILLER, P.C.

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